In the Supreme Court
of the United States

OCTOBER TERM, 1943

VANCOUVER BOOK & STATIONERY CO., INC., a Corporation,

Petitioner,

vs.

L. C. SMITH & CORONA TYPEWRITERS, INC., a Corporation; J. K. GILL CO., a Corporation; PACIFIC STATIONERY & PRINTING CO., an Oregon Corporation; and THE ADJUSTMENT BUREAU OF THE PORTLAND ASSOCIATION OF CREDIT MEN, an Oregon Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

To the United States Circuit Court of Appeals for the Ninth Circuit.

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CONSTITUTION AND STATUTES

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SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner is a small Washington corporation and had been engaged in the stationery, book and typewriter biusness in the City of Vancouver, Washington.

Respondents are as follows:

The Adjustment Bureau of the Portland Association of Credit Men is an Oregon corporation, having as one of its principal functions the liquidation of businesses. The J. K. Gill Co. is an Oregon corporation located at Portland, Oregon, and is engaged in the wholesale and retail merchandise business. L. C. Smith and Corona Typewriters, Inc., is a New York corporation, and has a branch office in Portland, Oregon. Pacific Stationery and Printing Co. is an Oregon corporation located at Portland, Oregon.

Petitioner commenced this action against respondents in the District Court of the United States for the District of Oregon. Two of the causes herein are in the nature of malicious prosecution for the wrongful bringing of two separate involuntary bankruptcy proceedings against petitioner. Some of the salient facts in the case are as follows:

Respondents executed an involuntary petition in bankruptcy in Portland, Oregon and filed it in the District Court of the United States for the Western District, Southern Division of Washington. The bankruptcy petition was based upon Sec. 3. a. (6) of Chapter III of the Bankruptcy Act, which states:

> "Acts of bankruptcy by a person shall consist of his having . . . (6) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt."

In that petition respondents alleged as the sole act comprising the commission of an act of bankruptcy, the execution of the following writing (Tr. 16):

Vancouver, Wn.,
Sept. 13, 1939

To the Creditors:

This is to advise that this firm is no longer able to continue its business. It is unable to pay its debts and is willing to be adjudged a bankrupt.

Vancouver Book & Stationery Co., Inc.
by W. P. Phillips,
Secretary and Manager.

Pl. pre-trial and trial
Exhibit 20

Phillips had been manager of petitioner, Joseph A. Hill, principal investor and stockholder, having engaged him as such. Prior to the execution of the so-called admission Hill had discharged Phillips, (Tr. 445) who thereupon went to respondents. Their attorney prepared the writing and Phillips then and there signed it without notifying Hill or calling a meeting of directors or stockholders, either de jure or de facto.

Petitioner contested the bankruptcy and on the eve of trial, the U. S. District Court for the Western District, Southern Division in Washington, upon motion of respondents, dismissed the petition without prejudice. (Tr. 17)

In the meantime respondents filed a new or second involuntary petition in bankruptcy (Tr. 17). In this second petition respondents again alleged that petitioner had committed an act of bankruptcy under Sec. 3. a. (6) of Chapter III of the Bankruptcy Act by Phillips signing that so-called admission. Petitioner again contested and at the trial respondents abandoned this same alleged cause.

In that second bankruptcy petition respondents alleged that petitioner also committed two acts of bankruptcy under Sec. 3. a. (3) of Chapter III of the Bankruptcy Act, which says in part:

> "Acts of bankruptcy by a person shall consist of his having . . . (3) suffered or permitted, *while insolvent*, any creditor to obtain a lien upon any of his property through legal proceedings and not having vacated or discharged such lien . . ."

On the two alleged causes under this section (3) trial was had before a jury, which held that when the attachment and levy were made petitioner was *not insolvent*. The court thereafter dismissed the second involuntary petition. (Tr. 18)

When the two involuntary bankruptcy petitions were filed there were attachments and levies against the major portion of the stock and fixtures of petitioner for claims on which there was about $1000.00. However, no attachment or levy had been made against the accounts receivable and other personal property comprising a considerable portion of petitioner's assets. (Tr. 93, 310-326)

Under this state of facts and in anticipation of an execution sale respondents had filed a petition for the appointment of a receiver in the second bankruptcy proceeding (Ex. 14). Respondents presented this petition ex parte and without any notice to petitioner and in violation of Rule 65 (a) and (b) of the Federal Rules of Civil Procedure and obtained an order appointing a receiver and restraining "all persons whomsoever . . . from in any wise interfering with any of the assets of petitioner."

The receiver qualified by filing an approved surety bond. (Ex. 14) Petitioner offered proof that the attachments and levies that were placed against stock and fixtures of petitioner were, by consent, accomplished through a keepership under which petitioner's business was kept open and operating until shortly before the filing of the first bankruptcy petition; and that respondents induced and procured the Washington State Tax Commission to close petitioner's business under its $89.21 lien (it had claimed a $300.00 lien). The district court denied petitioners the right to present the evidence offered (Tr. 277, 278); and although the receiver took no other affirmative action, he did report to the court that an inventory showed stock and fixtures of the value of $3088.44, and he petitioned the court for an order to sell; but, upon hearing, the court denied the petition. (Ex. 14)

The property of petitioner was thus tied up by the receivership for about six months, during which time rent and keeper's fees accumulated, petitioner's lease

was cancelled, and its business and good will were ruined. There being no hope of sale of petitioner's stock at retail in the ordinary course of business, upon respondents agreeing to a dismissal of the receivership, petitioner agreed to a forced sale of the stock and fixtures, the proceeds to be held to abide the trial on the second involuntary bankruptcy petition. Only $1277.00 was obtained from the forced sale, all of which went towards keeper's fees, rent, etc. and petitioner realized nothing therefrom.

Many months later the trial occurred and dismissal followed. Action was thereafter brought in the Federal District Court of Oregon, the State where the wrongful proceedings were initiated for consummation in the State of Washington. Petitioner timely demanded a jury trial. The records of the proceedings in the bankruptcy cases were introduced by petitioner to make a prima facie case of malicious prosecution. (Exhibits 12 and 14)

Petitioner claimed a number of causes of action against respondents but we shall here mention only two. One was for the wrongful filing of the first bankruptcy proceeding, i. e., the one based solely upon the so-called admission in writing by Phillips. It was undisputed that Phillips had been discharged by petitioner when he signed the admission (Tr. 445) and that the writing was prepared by respondents' attorney and signed then and there without a meeting of or authorization by the directors or stockholders (Tr.

70) and that this proceeding in bankruptcy was dismissed on motion of respondents (Tr. 16).

The second cause of action mentioned in the preceding paragraph is based upon the wrongful taking of the second involuntary bankruptcy proceedings, wherein three acts of bankruptcy were alleged. We have already covered the first cause, which was based on the Phillips "admission". The second and third causes in the second bankruptcy petition were based upon allegations that petitioner had failed to remove liens while allegedly insolvent. Petitioner made a prima facie case of want of probable cause by introducing the record of that proceeding, showing that the Federal District Court in Tacoma, Washington, entered a judgment of dismissal after the jury returned a verdict that petitioner was not insolvent when the liens were obtained. (Tr. 18)

But petitioner augmented its prima facie case by further proof of solvency. The undisputed testimony was that petitioner had assets of the fair value of $10,312.00 and liabilities of $3500.00 when the liens were obtained and the petitions filed. (Tr. 326)

These are some of the undisputed salient facts that made up the record when the trial court cut off the case and directed a verdict for the respondents. (Tr. 472) Petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit which affirmed the District Court on November 1, 1943. Its opinion appears on page 487 of the Transcript and is reported in 138 Fed. (2d) 635.

JURISDICTION OF THIS COURT

The jurisdictional statute upon which your petitioner relies to invoke the jurisdiction of this Court is Title 28, Section 347 U.S.C.A. (Judicial Code Section 240) of the United States. The District Court had jurisdiction because of the diversity of citizenship of the parties and the amount in controversy exceeded $3000.00. See 28 U.S.C.A. Sec. 41, (1) and (c). The Circuit Court of Appeals had jurisdiction under 28 U.S.C.A. Sec. 225 (a) First.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. Since petitioner had not yet closed its case or put in all of its testimony at the time the District Court directed a verdict against it and since all of the undisputed facts presented in evidence showed that petitioner had at least two good causes of action against respondents, petitioner was denied the right of trial by jury and the rights guaranteed it under the Seventh and Fourteenth Amendments to the Constitution.

2. The District Court erred in denying petitioner the right to introduce evidence before the jury that tended to show malice (Tr. 287, 280) on the part of respondents and the Circuit Court of Appeals was in error in adding "insult to injury" by stating in its

opinion that "there was no affirmative showing of malice."

3. The Circuit Court of Appeals erred in that it applied as the definition of *insolvency* the law as it existed under the Bankruptcy Act of *1867* instead of the Act of *1898*. (See Remington on Bankruptcy, Vol. 4 A, 5th Ed., Sec. 1686.) Under the 1867 Act insolvency was interpreted to mean the inability to pay debts as they matured. Under the Act of 1898, which has been in effect ever since, and under the interpretation of that act by other Circuit Courts of Appeal and by this court, insolvency means exactly what the act says, to-wit:

> "Chapter I, Section 1. (19)—A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property . . . shall not at a fair valuation be sufficient in amount to pay his debts."

The only evidence concerning solvency of petitioner was the court's judgment of dismissal based upon the verdict of the jury that petitioner was solvent; and the further evidence adduced by petitioner that its assets, exclusive of the value of its lease, were worth $10,312.00 and its liabilities were $3,500.00. The lower court used as its measure of insolvency the financial stress of petitioner, declining sales, inability to pay its debts, etc. The confusion of the Circuit Court of Appeals becomes apparent when it refers to "the admission of insolvency" on line 12 of page 492 of the transcript, which is the

statement in writing by Phillips "acknowledging the Stationery Company's inability to pay its debts . . ." See lines 27 and 28 on page 488 of the Transcript.

4. The lower courts erred in refusing to follow and give effect to the law as laid down by this court in Mueller vs. Nugent, 184 U.S. 1, 7 Am. B. R. 224, 22 Sup. Ct. 269, 46 Law Ed. 405, that "the filing of the petition (in bankruptcy) is a caveat to all the world and *in effect an attachment and injunction.*" This is the law generally and its application should not be averted because part of petitioner's assets were already attached.

5. The lower courts erred in refusing to follow the general rule of law and the one laid down by other Circuit Courts of Appeal that the appointment of a receiver in a bankruptcy proceeding under an order restraining all other persons from interfering with the assets of alleged bankrupt, coupled with the qualification of the receiver, effects a sequestration of the alleged bankrupt's property. The fact that a part of petitioner's assets, which, according to the inventory report of the receiver was worth $3088.44, was held under valid prior liens or attachments for about $1000.00 does not alter the legal or practical effect of the appointment and qualification. In this case the receiver made a report of inventory and petitioned for authority to sell. Moreover there were some physical assets as well as all the accounts receivable which had not been attached.

6. The lower courts erred in refusing to give effect to and follow the law as laid down by other Circuit Courts of Appeal, which hold that an admission in writing by a corporation that it is unable to pay its debts and is willing to be adjudged a bankrupt must be made or authorized by its directors or stockholders. The fact was uncontroverted that the admission signed by Phillips was not executed pursuant to a meeting of or authorization by the stockholders or directors. Phillips had been discharged by Hill, who had originally hired him. This was the unqualified state of the record when the lower courts held that this writing constituted probable cause for filing the two bankruptcy petitions against petitioners. We have already pointed out that such admission, if valid otherwise, could have no bearing on the issue of solvency as defined by the Bankruptcy Act ever since 1898. But it also gave no good cause for the filing of the first petition and the first alleged cause in the second petition. All one needs to do is to apply the law to the facts. Respondents did that and both times abandoned attempts to present a case on that issue. It was clear error for the lower courts to fail to apply the law to such an undisputed state of facts.

7. The Circuit Court of Appeals decided, contrary to local law in both Oregon and Washington, and contrary to the general law and against the great weight of authority, that a seizure of property must take place in order to give rise to a cause of action for malicious prosecution for the wrongful institution

of involuntary bankruptcy proceedings. In so holding the Circuit Court of Appeals confused the rights of an alleged bankrupt on a bond under Section 69 a. and b. of the Bankruptcy Act, and for an action for malicious prosecution. That distinction is noted in In re Ito Terusaki, 238 Fed. 934, a case decided in the District Court of the State of Washington. After holding that as against the bondsman there must be proof of actual seizure, the Court said on page 936:

> "If the bankrupt has been damaged, he has a remedy; but it is not in this proceeding against the bondsmen."
>
> "There is no liability for filing a petition in bankruptcy, except for the usual costs, unless the petitioners acted without probable cause and maliciously, in which case the remedy is an action in the nature of a suit for malicious prosecution."

PRAYER FOR WRIT

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding that Court to certify and to send to this Court for its deview and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 10215 Vancouver Book & Stationery Co., Inc., a corporation, Appellant, vs. L. C. Smith & Corona Type-

writers, Inc., a corporation; J. K. Gill Co., a corporation; Pacific Stationery & Printing Co., an Oregon corporation; and The Adjustment Bureau of the Portland Association of Credit Men, an Oregon corporation, Appellees; and that the judgment of the District Court of the United States for the District Court of Oregon that was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, be set aside and that petitioner be granted a new trial before a jury, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Vancouver Book & Stationery Co., Inc.,
a corporation, Petitioner.

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